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No. 87-548

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Airline Industrial Relations Conference (AIRCON) hereby moves this Court for leave to file the attached brief as *Amicus Curiae* in support of Petitioner Trans World Airlines (TWA). Respondent Independent Federation of Flight Attendants (IFFA) has refused to consent to AIRCON's participation in this case as an *Amicus Curiae*. Petitioner TWA has consented to AIRCON's participation.

AIRCON has a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in these areas with respect to legislative, judicial and administrative matters. Because the decision in this case will have a substantial impact on collective bargaining and the availability of self-help during strikes, AIRCON wishes to provide the Court with an industry-wide perspective on the issues raised by this case.

The instant brief suggests an appropriate interpretation and application of the Railway Labor Act (RLA) to the post-strike treatment of permanent replacements and employees who continue working by crossing picket lines (*i.e.*, "cross-overs"). Although the Railway Labor Act regulates labor relations in the air transport industry, the Eighth Circuit did not examine the RLA's impact upon the issues presented by the IFFA-sponsored strike against Trans World Airlines, but relied upon an erroneous analogy to the National Labor Relations Act (NLRA). Because the parties are concerned primarily with the decision of the Eighth Circuit which focuses on an interpretation of NLRA precedent, they may concentrate their arguments on the proper interpretation and application of that Act as a predicate for interpretation of the Railway Labor Act. AIRCON's brief suggests to the Court an alternative approach to the issues framed by the Eighth Circuit which emphasizes the unique language, legislative history, and structure of the Railway Labor Act. AIRCON believes that its argument centered upon the Railway Labor Act will be of assistance to the Court in resolving this case.

WHEREFORE, the Airline Industrial Relations Conference respectfully prays that this Motion be granted, and that the attached brief be filed.

Respectfully submitted,

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QUESTION PRESENTED

Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permamently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

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BRIEF OF *AMICUS CURIAE* THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE

INTERESTS OF *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court, the Airline Industrial Relations Conference (AIRCON) files this brief as *Amicus Curiae* in support of Petitioner Trans World Airlines (TWA).[1] AIRCON

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[1] AIRCON has filed concurrently with this brief a Motion For Leave To File Brief As *Amicus Curiae*, which is necessitated by the refusal of the Respondent Independent Federation of Flight Attendants (IFFA) to agree to AIRCON's participation in this case as *Amicus Curiae*.

adopts and supports wholeheartedly the arguments of Petitioner TWA that precedent under the National Labor Relations Act (NLRA) does not support the Eighth Circuit's ruling. As TWA argues, when IFFA abandoned its economic strike and more senior striking flight attendants attempted to return to work, TWA was not prohibited under NLRA standards from retaining flight attendants who crossed IFFA-sponsored picket lines (*i.e.*, "cross-overs"). AIRCON writes separately in order to emphasize to the Court that the court below almost entirely ignored the unique language, legislative history and structure of the Railway Labor Act and to provide an industry-wide perspective on the question before the Court.

The Airline Industrial Relations Conference has a substantial interest in the disposition of this case. AIRCON is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters. AIRCON represents its member carriers with respect to legislative, judicial and administrative proceedings in the labor relations and personnel areas. The membership of AIRCON includes virtually every major air carrier in the United States and, therefore, AIRCON's members will be directly and substantially affected in their labor relations by the resolution of this case.

The decision of the Eighth Circuit affects both the ability of carriers under the Railway Labor Act to operate during a strike and the right of employees to decline to participate in a strike and to cross picket lines. A decision which effectively requires discrimination *against* cross-overs has an obvious impact on a carrier's ability to maintain operations during a strike. Thus, this Court's decision will be of fundamental importance to carriers' determinations and ability to use self-help and, similarly, to unions' determinations and ability to initiate, maintain or prolong Railway Labor Act strikes.

For these reasons, AIRCON respectfully submits this brief as *Amicus Curiae*.

SUMMARY OF ARGUMENT

This case presents a union's challenge under the Railway Labor Act to a carrier's post-strike retention of employees who crossed picket lines (*i.e.*, "cross-overs"). IFFA's claim against TWA arises, if at all, under Sections 2 Third and 2 Fourth of the Railway Labor Act, 45 U.S.C. §§ 152 Third and Fourth. Despite the controlling effect of these provisions, the court below provided no analysis of the language and legislative history of the RLA or of the precedent developed under Sections 2 Third and 2 Fourth. Instead, the lower court applied its misperception of the precedent under the National Labor Relations Act, and it did so in direct contradiction of this Court's admonition that utmost care must be taken in drawing parallels between the NLRA and the RLA.

Had the court below examined the language and legislative history of Sections 2 Third and 2 Fourth, it would have discovered that Congress crafted those sections specifically to protect employees in the organizing context, a considerably more limited task than was intended for Sections 7, 8(a)(1), and 8(a)(3) of the NLRA, 29 U.S.C. §§ 157, 158(a)(1), and 158(a)(3). This distinction obviously restricts the relevance of NLRA principles to this case. Thus, the court below erred not only by misinterpreting NLRA precedent, but also by failing to recognize that the RLA provides much more limited protection for employee concerted activity outside the organizing context than does the NLRA.

Under the unique dispute resolution scheme created by the RLA, the rights of returning strikers have long been dealt with in the collective bargaining process, specifically in the form of back-to-work agreements. IFFA

has sought to obtain in federal court what it was unable to obtain at the bargaining table. But, the language, legislative history and structure of the RLA indicate that Congress did not intend the federal courts to impose *ad hoc* resolutions on the parties to such disputes. The decision below, if permitted to stand, will more deeply immerse the federal courts in RLA strikes and adversely affect the collective bargaining process.

ARGUMENT

I. The Court Below Erred Not Only In Its Analysis Of NLRA Precedent, But Also In Its Failure To Consider The Unique Language And Legislative History Of The RLA

AIRCON concurs completely in TWA's argument that the Court of Appeals erred in resolving the cross-over issue below because it misapplied established strike replacement precedent under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, particularly *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). But the Eighth Circuit committed a second fundamental error by deciding a case under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, exclusively on the basis of NLRA analogy and without an analysis of the applicability of the Railway Labor Act's unique provisions to the issues presented.

A. *The Eighth Circuit Ignored The Relevant Provisions Of The RLA*

The Eighth Circuit's decision does not identify the provision of the Railway Labor Act that TWA purportedly violated. It found unlawful discrimination in TWA's treatment of cross-overs, holding that:

> . . . TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity.

IFFA v. Trans World Airlines, 819 F.2d 839, 843.

The opinion, however, contains no citation to, let alone discussion of, the two provisions of the Railway Labor Act which, if any, must control this case—Section 2 Third and Section 2 Fourth, 45 U.S.C. §§ 152 Third and 152 Fourth. Sections 2 Third and 2 Fourth are the only "nondiscrimination" provisions of the Railway Labor Act that can provide any basis for federal court intervention to protect covered "employees" from employer retaliation for union-related activities. *See Teamsters v. Pan American World Airways*, 607 F. Supp. 609, 614 (E.D.N.Y. 1985) (Sections 2 Third and 2 Fourth challenge to post-strike treatment of cross-overs); *see also Machinists v. Alaska Airlines*, 813 F.2d 1038, 1040 n.1 (9th Cir.), *cert. denied*, 108 S. Ct. 290 (1987) (Section 2 prohibits employer interference). The court's statement about discrimination is, therefore, implicitly a conclusion that TWA violated Section 2 Third and Section 2 Fourth of the Railway Labor Act, for there are no other provisions of the Act that even arguably provide a statutory basis for the Eighth Circuit's decision.[2]

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[2] The District Court more directly addressed the applicable RLA provisions and standards. The District Court expressly rejected an IFFA argument that the RLA provided *greater* protection for employee strike activity than the NLRA. *IFFA v. Trans World Airlines*, 643 F. Supp. 470, 475 (W.D. Mo. 1986). The District Court stated:

> IFFA's final argument for its contention that strikers should have the right to displace cross-overs is that the court should disregard the NLRA precedents in favor of the allegedly greater protection given employees under the Railway Labor Act. This contention, which was emphasized at oral argument, is wholly lacking in support in the cases. On the contrary, the Second Circuit has recently noted that the Railway Labor Act explicitly protects only "organizing and representational

The central flaw in the Eighth Circuit's analysis of the cross-over issue it that it relied *exclusively* upon precedent under the National Labor Relations Act applying and interpreting Sections 7, 8(a)(1), and 8(a)(3), 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3). *See* 819 F.2d at 843-45. Indeed, the underlying, unaccountable assumption of the Eighth Circuit's decision is that the RLA issue of retaining cross-overs after a strike is governed by the standards of Sections 7, 8(a)(1), and 8(a)(3) of the NLRA. But as argued more fully below, the assumed equivalence of NLRA and RLA protections of union activity in a strike is a proposition unsupported by statutory language, legislative history, or precedent.

Overall, a review of the decision below and the Railway Labor Act leads to the undeniable conclusion that there are no statutory provisions other than Sections 2 Third and 2 Fourth of the RLA which can conceivably support IFFA's claim of an RLA violation.

B. *Analogies Between The RLA And The NLRA Must Be Carefully Scrutinized*

In examining the cross-over seniority issue under Sections 2 Third and 2 Fourth of the RLA, this Court should avoid the uncritical analogy to the NLRA utilized by the court below.

The Court has repeatedly opined on the differences between the RLA and the NLRA and the necessity for only the most careful comparisons:

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rights, as opposed to the broader 'concerted activity' rights under the Wagner Act." *IUFA v. Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986).

Id. The citation to the Second Circuit's decision is significant because *IUFA v. Pan American World Airways* is a decision under Sections 2 Third and 2 Fourth which holds that those provisions have narrower application than the NLRA provisions protecting "concerted activity." Thus, the District Court clearly viewed this case as arising under Sections 2 Third and 2 Fourth of the RLA.

> It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.

Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969); *see also Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971); *Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 31 n.2 (1957). That the Eighth Circuit failed to follow the Supreme Court's directive of care in analogizing between the NLRA and the RLA should result in an even more probing analysis of the decision below.

Only last term, the Court followed its stated approach by refusing to incorporate the NLRA ban on secondary activity into the RLA after finding the absence of any statutory basis in the RLA. *Burlington Northern R.R. v. BMWE*, 107 S. Ct. 1841 (1987).[3] The Court should adopt the same approach here and focus on the unique language and limited purpose of Sections 2 Third and 2 Fourth of the RLA in resolving the question of cross-over job entitlement after a strike.

AIRCON submits that an informed analysis of the RLA's applicability to the cross-over controversy will lead the Court to conclude that the Eighth Circuit's intervention on behalf of the IFFA, after the Union's unsuccessful strike against TWA, was without statutory basis.

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[3] *See also Landers v. National Railroad Passenger Corp.*, 56 U.S.L.W. 4355, 4356 (April 27, 1988) ("We are unwilling to read into the Railway Labor Act a right to minority union participation in company-level grievance and disciplinary proceedings that Congress declined to put there.")

II. Sections 2 Third And 2 Fourth Of The Railway Labor Act Have Limited Application Outside The Context Of A Union Organizing Campaign

Because IFFA's challenge to TWA's post-strike retention of cross-overs must arise under Sections 2 Third and 2 Fourth of the Railway Labor Act, the decision of the Court of Appeals is defensible only if it is consistent with the unique language, legislative history and structure of those statutory provisions. The court below did not appreciate that the RLA, unlike the NLRA, does not provide any generalized protection for employee "concerted activity" and that the protections included in the RLA are limited to the context of union organizing campaigns. Thus, the Eighth Circuit erred not only by misinterpreting the NLRA, but also by failing to recognize that the RLA provides a more circumscribed set of protections for employee concerted activity than does the NLRA.

A. *The Language And Legislative History Of The RLA Demonstrate An Intention To Protect Concerted Activity Primarily In The Organizing Context*

In a case such as this which arises under a complex statutory scheme, this Court looks primarily to the language of the statute for guidance. *See Caminetti v. United States*, 242 U.S. 470, 474 (1916); *see also Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1854 n.15 (describing the Court's traditional focus on the language of the RLA). An examination of the language of Sections 2 Third and 2 Fourth of the RLA reveals that these sections were carefully crafted to address *pre-certification* representation disputes, not to address issues that arise in the context of a mature collective bargaining relationship, and certainly not to address issues related to the proper application of seniority rights following a lawful strike.

For example, Section 2 Third provides in pertinent part:

> Representatives, for the purposes of this chapter, *shall be designated* by the respective parties without interference, influence, or coercion by either party *over the designation* of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its *choice of representatives.*

45 U.S.C. § 152 Third (emphasis added). By its terms, Section 2 Third prohibits interference, influence and coercion with respect to the designation or choice of representatives. The statute makes no mention of other forms of concerted activity nor does it actually use the phrase "concerted activity" or "concerted action." *Compare* 29 U.S.C. § 157 (NLRA provision protecting the right to engage in "concerted acitvities").

Section 2 Fourth is similarly focused on the pre-certification organizing context. In pertinent part, Section 2 Fourth provides:

> Employees shall have the *right to organize* and bargain collectively through *representatives of their own choosing*. The majority of any craft or class of employees shall have the *right to determine who shall be the representative* of the craft or class for purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees *to join, organize, or assist in organizing* the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way *with the organization* of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

45 U.S.C. § 152 Fourth (emphasis added). Once again, the language of Section 2 Fourth evidences a Congres-

sional intent to create a limited set of protections that apply specifically to the organizing context.

The legislative history of the RLA confirms that Congress intended Sections 2 Third and 2 Fourth to be limited to the organizing context and for the employee protections of the RLA to be more narrow than the protections created by the NLRA. *See Machinists v. Street*, 367 U.S. 740, 759 (1961) (discussing the 1934 amendments to the RLA adding Section 2 Fourth to address the company union problem). In 1936, Congress amended the Railway Labor Act to extend its coverage to include the airline industry. *See* Pub. L. No. 74-487, 49 Stat. 1189 (1936). This occurred concurrently with Congress' consideration of the Wagner Act. *See An Act to Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate or Foreign Commerce: Hearings on S. 2496 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 25 (1935). In the course of hearings on the 1936 amendments, the following exchange involving the similarity of the NLRA and RLA occurred between Senator Minton, Chairman of the Senate Committee on Interstate Commerce, and O. S. Beyer, Director of Labor Relations in the Office of the Federal Coordinator of Transportation:

> Senator Minton: The Railway Labor Act that you are speaking about up to that point is similar in character to the so called "Wagner Bill"?
>
> Mr. Beyer: No; it is not.
>
> Senator Minton: In theory?
>
> Mr. Beyer: In theory it is, *only up to the point of safeguarding employees' right to organize.*

Id. (emphasis added). It is difficult to imagine a more explicit legislative recognition that the employee protections provided by the RLA are limited to the organizing

context and are not as broad as those provided by the NLRA. *See IUFA v. Pan American World Airways*, 739 F.2d at 141 n.2.

Interpreting Sections 2 Third and 2 Fourth as primarily directed at pre-certification representation disputes is completely consistent with the statutory dispute resolution framework of the Railway Labor Act. To ensure employee freedom of choice in the selection of representatives, Congress included the judicially enforceable prohibitions on employer interference in Sections 2 Third and 2 Fourth. *See Railway Labor Act Amendments: Hearings on H.R. 7650 Before the Comm. on Interstate and Foreign Commerce of the House of Representatives*, 73rd Cong., 2d Sess. 21-23 (1934). Once a collective bargaining representative is selected by employees and certified by the National Mediation Board, the Act uses two principal mechanisms for the resolution of disputes. First, an almost interminable process of collective bargaining is established to deal with disputes over the formation of new agreements or "major disputes." *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945). Second, the Act imposes a duty upon the carrier and the union to establish a "Board of Adjustment" for the resolution of "minor disputes" which are defined as "disputes . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . . ." 45 U.S.C. §§ 153(i) and 184.

When Congress enacted the NLRA and its broad protections under Sections 7, 8(a)(1), and 8(a)(3) for employee concerted action, it also created a quasi-judicial administrative agency with special expertise in labor relations to enforce those broad protections. *See Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967) (describing NLRB jurisdiction); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (describing NLRB expertise). In contrast, conspicuously absent from the RLA scheme is any analogue to the National Labor Relations Board's

jurisdiction over unfair labor practice charges. This absence can be explained by the reliance of the Railway Labor Act upon private dispute resolution procedures of negotiation and arbitration. The private and consensual character of the Railway Labor Act—itself a product of negotiation [4]—has also circumscribed the judicial role for enforcement of the RLA to intervention to ensure that the Act's procedures for resolving major, minor, or representation disputes are functioning. *Air Line Pilots v. Texas Int'l Airlines*, 656 F.2d 16, 19-20 (2d Cir. 1981).[5] The absence of an enforcement agency analogous to the NLRB and the limited role for judicial enforcement under the RLA strongly support a narrow reading of Sections 2 Third and 2 Fourth.

In short, the language, legislative history and structure of the RLA demonstrate that Sections 2 Third and 2 Fourth are narrow-gauge provisions intended to protect employees engaged in organizing activity. It is simply erroneous to equate these RLA provisions to Sec-

[4] The Supreme Court has recognized that the Railway Labor Act was negotiated between carriers and unions and has relied upon this fact in holding that it creates limited restraints upon self-help and the collective bargaining process. *Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1852 n.13; *see also Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548, 560-64 (1930).

[5] *See IUFA v. Pan American World Airways*, 789 F.2d at 141 ("Running through Congress' exacting allocation of administrative jurisdiction is a 'thread' of judicial intervention in cases in which, 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'"); *APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW) (judicial intervention under the RLA only when "the essential framework for bargaining between management and the union has broken down."); *see also Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 581 (1971) (major disputes); *Machinists v. Northwest Airlines*, 673 F.2d 700, 707-08 (3d Cir. 1982) (minor disputes); *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (representational disputes).

tions 7, 8(a)(1), and 8(a)(3) of the NLRA, which provide broad protection to almost all types of employee concerted action and apply both before and after a collective bargaining relationship has been established.

B. *Courts Have Circumscribed Post-Certification Application Of Sections 2 Third And 2 Fourth*

In *Texas & New Orleans R.R. v. Railway Clerks*, 281 U.S. 548 (1930), this Court's first and only application and interpretation of Section 2 Third, the Court recognized that the core purpose of that provision is to protect organizing activities. The Court held that there was a private cause of action to enforce Section 2 Third in federal court, but this holding was limited to the protection of unrepresented employees from carrier retaliation for union organizing activity. In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), this Court examined the rights created by Section 2 Fourth in the context of a court challenge to a representation determination of the National Mediation Board (NMB). The Court concluded that Congress intended the NMB's representation procedures under Section 2 Ninth, 45 U.S.C. § 152 Ninth, rather than the federal courts, to be the principal enforcement mechanism for representation rights under Section 2 Fourth. *Id.* at 300-03; *see also Railway Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659 (1965); *Machinists v. Street*, 367 U.S. at 759.

For over fifty years, the lower courts have followed this Court's lead and enforced Sections 2 Third and 2 Fourth principally to protect the RLA's representation procedures and to ensure the employees a free choice of union representation. *See, e.g., Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984); *Stepanischen v. Merchants Despatch Transp. Co.*, 722 F.2d 922 (1st Cir. 1983); *Adams v. Federal Express Corp.*, 470 F. Supp. 1356 (W.D. Tenn. 1979), *aff'd*, 654 F.2d 452 (6th

Cir. 1981); *Kent v. Fugere*, 438 F. Supp. 560 (D. Conn. 1977).

Since *Texas & N.O.R.R.*, unions and represented employees have also attempted to secure judicial enforcement of Section 2 Third, and Section 2 Fourth, outside of the organizing context. With markedly few exceptions, however, courts have resisted these efforts and have adhered to Congress' clear intent to restrict these provisions. As one court recently stated:

> Sections 152 Third and Fourth by their own terms apply to the designation and choice of representatives, and section Fourth specifically prohibits employer interference with formation of the labor organization. Courts generally have given limited scope to this special statutory protection for the formation of labor organizations, and have held that section 152 Third and Fourth give limited rights outside the context of a representation contest.

IUFA v. Pan American World Airways, 620 F. Supp. 447, 455 (S.D.N.Y. 1985), *aff'd*, 789 F.2d 139 (2d Cir. 1986) (citations omitted); *see also Machinists v. Northwest Airlines*, 673 F.2d at 707; *Rachford v. Evergreen Int'l Airlines*, 596 F. Supp. 384, 386 (N.D. Ill. 1984).

In refusing to consider post-certification claims under Sections 2 Third and 2 Fourth, courts have often noted that once a union is certified by the National Mediation Board and one of the RLA's non-judicial, dispute resolution mechanisms is available to deal with the labor-management controversy in question, there is limited need for federal court involvement. *See Machinists v. Northwest Airlines*, 673 F.2d at 707. Conversely, the cases in which courts have exercised jurisdiction over a Section 2 Third or Section 2 Fourth claim outside of the organizing context, all involve extraordinary factual patterns which have resulted in the Act's dispute resolution procedures being rendered ineffective. *See, e.g., Brady v. Trans World Airlines*, 401 F.2d 87, 93 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (breach

of the duty of fair representation); *Trainmen v. Central of Georgia Ry.*, 305 F.2d 605, 608-09 (5th Cir. 1962) (Adjustment Board procedure rendered ineffective). *But see Machinists v. Eastern Airlines*, 320 F.2d 451, 454 (5th Cir. 1963) (limiting *Central of Georgia* to its facts); *APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW).

C. *Sections 2 Third And 2 Fourth Should Be Given Limited Post-Certification Application*

AIRCON does not believe that it is necessary in this case for the Court to define definitively the scope of judicial enforcement of Sections 2 Third and 2 Fourth. But the Court should recognize that Sections 2 Third and 2 Fourth do not provide the type of pervasive protection for "concerted activity" provided by Sections 7, 8(a)(1), and 8(a)(3) of the NLRA. Rather, the RLA provisions are intended only as statutory protections of the employees' free choice of a representative through the representation procedures administered by the National Mediation Board.

If Sections 2 Third and 2 Fourth are to be given *any* post-certification application, then it should be limited to circumstances where the Act's non-judicial dispute resolution procedures have been rendered ineffective or, alternatively, where a carrier has undertaken a sustained effort to "destroy a union" or otherwise made a "fundamental attack on the collective bargaining process." *Machinists v. Alaska Airlines*, 813 F.2d at 1040; *see also APFA v. American Airlines*, 843 F.2d 209 (5th Cir. 1988) (WESTLAW); *IUFA v. Pan American World Airways*, 789 F.2d at 141-42; *Machinists v. Northwest Airlines*, 673 F.2d at 708-09. The mere allegation that a particular action may have an adverse impact on a union is simply insufficient to create federal court jurisdiction under Sections 2 Third and 2 Fourth in a post-certification context. *Machinists v. Alaska Airlines*, 813 F.2d at

1040-41; *Machinists v. Northwest Airlines*, 673 F.2d at 709. As discussed more fully below, the issue of retention of cross-overs in an economic strike meets neither of these narrow potential exceptions allowing post-certification enforcement of Section 2 Third and Section 2 Fourth.

III. Sections 2 Third And 2 Fourth Do Not Prohibit The Post-Strike Retention of Cross-Overs

A. *The RLA Places Few Restrictions On The Use Of Self-Help After The Exhaustion Of The Collective Bargaining Process*

As demonstrated above, Section 2 Third and Section 2 Fourth were enacted for the specific purpose of protecting employees from carrier interference in union organizing drives, *prior to* the National Mediation Board's certification of a union as exclusive bargaining representative. Accordingly, Section 2 Third and Section 2 Fourth have little, if any, relevance to questions of a carrier's exercise of self-help in collective bargaining disputes *after* a union has been certified and *after* exhaustion of the RLA "major dispute" procedures.

Until recently, lawful strikes under the Railway Labor Act have been relatively rare phenomena. This is not surprising because the Act's major dispute procedures for resolving collective bargaining disputes are "virtually endless", encompassing "negotiation, mediation, voluntary arbitration, and conciliation." *Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1850; *see also Detroit & Toledo Shore Line Ry. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969); *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 378. Yet implicit in the Railway Labor Act is the parties' right to engage in economic self-help once the Act's procedures are exhausted. *Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284, 290-91 (1963); *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 244 (1966).

This Court has been hesitant to interpret the RLA as constraining the parties in their ultimate exercise of self-help. In *Burlington Northern R.R. v. BMWE*, 107 S. Ct. 1841, the Court rejected a carrier argument that the RLA contains a limitation on union secondary boycotts derived from the Act's structure and an analogy to the NLRA. Quoting the Court's prior decision in *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 392, the Court stated:

> [P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law.

107 S. Ct. at 1852. The Court also has recognized a carrier's right to self-help by authorizing the modification of existing agreements during a strike in order to permit continued operations. *See Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), *as analyzed in, Burlington Northern R.R. v. BMWE*, 107 S. Ct. at 1853 n.14.

If, as advocated by IFFA and implicitly supported by the Eighth Circuit, Sections 2 Third and 2 Fourth apply to a post-certification exercise of lawful self-help, then the Court would be creating a new and higher level of judicial intervention in major disputes. Such an expansion in application of Sections 2 Third and 2 Fourth, more than fifty years after *Texas & N.O.R.R.*, is not justifiable under the language, legislative history or the structure and purposes of the RLA.

B. *The Lower Courts Are Divided Concerning The Application Of Sections 2 Third And 2 Fourth In Lawful Strikes*

A number of federal courts have recently applied Section 2 Third and Section 2 Fourth in strike situations. The Seventh Circuit and First Circuit recently have

cited these provisions to restrict carrier self-help under the RLA. These decisions commit the same fundamental error: they fail to consider the unique characteristics of the RLA which, as *Burlington Northern* holds, regulates self-help less than the NLRA.

The Seventh Circuit in *Air Line Pilots v. United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), found unlawful, in part under Sections 2 Third and 2 Fourth, a carrier effort to rebid all pilot positions on the airline during a strike. In reaching this conclusion, the court relied heavily on an analogy to Section 8(a)(3) of the NLRA. 802 F.2d at 897-98. Like the Eighth Circuit's decision below, the Seventh Circuit's decision is suspect because that court failed to address the pre-certification focus of Sections 2 Third and 2 Fourth of the RLA. *Id.*

In *RLEA v. Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S .Ct. 102 (1987), the First Circuit found that job abolishments imposed by a carrier against strikers and sympathy strikers violated Section 2 Fourth as discriminatory retaliation for union activity. The facts involved the volatile and controversial Maine Central dispute, which the Court reviewed in *Burlington Northern*. The First Circuit also relied upon a broad reading of Section 2 Fourth that seems inconsistent with its own prior decision in *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d at 927, which recognized that Section 2 Fourth was directed toward protecting organizing activity.

In contrast, the Ninth Circuit recently considered a factual record akin to the current dispute in *Machinists v. Alaska Airlines*, 813 F.2d 1038. In a recall of sympathy strikers after a strike, the carrier gave priority to permanent replacements and employees who had crossed the picket lines. The union challenged the recall under Sections 2 Third and 2 Fourth. The Ninth Circuit found no violation of those provisions. It noted that the Section 2 Third and 2 Fourth cases relied upon by the union involved either (1) pre-certification cases of "individual employees who alleged they were discharged for attempting to organize a union," 813 F.2d at 1040, or (2) "a fundamental attack on the collective bargaining process" or "a direct attempt to destroy a union", 813 F.2d at 1040. Because the union presented a seniority question and a current agreement covered the sympathy strikers, the Court of Appeals concluded that the seniority rights of recalled strikers was a minor dispute within the exclusive jurisdiction of an adjustment board.[6] *See also Teamsters v. Pan American World Airways*, 607 F. Supp. at 614 (sympathy strikers do not state Section 2 Third claim relating to order of recall; seniority issues are a minor dispute). In contrast, here, where no collective bargaining agreement provision was applicable, the cross-over issue is committed to collective bargaining.

AIRCON submits that the Ninth Circuit's analysis of a strike recall issue under Sections 2 Third and 2 Fourth is correct as a matter of law. The provisions were not intended to be applicable after union certification. Therefore, unless a union can establish a "fundamental attack on the collective bargaining process", judicial intervention under Section 2 Third and Section 2 Fourth with respect to strike replacement issues is inappropri-

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[6] The Ninth Circuit appreciated that the real complaint underlying the allegation of statutory violations was that the union had not prevailed in its contest of economic muscle against the carrier:

> [The union] does not contend that Alaska [Airlines] was attempting to interfere with the workers' choice of a bargaining representative; the union alleges only that the recall plan weakens their union by replacing members, and so violated the RLA. This roundabout effort to reach a statutory violation is not a sufficient ground for a court to assume jurisdiction.

813 F.2d at 1040-41.

ate. Whether the fact patterns in the *United Air Lines* or *Boston & Maine* cases could have met that necessary standard of carrier action cannot be determined retrospectively. But certainly, those cases' facile analogy between the NLRA and the RLA in applying Sections 2 Third and 2 Fourth should not be extended to support a general rule prohibiting the retention of cross-overs after a strike.

C. *Sections 2 Third And 2 Fourth Have No Application In The Present Case*

The Railway Labor Act provides a mechanism for resolving the cross-over dispute that IFFA has sought for the federal courts to decide—*collective bargaining*. Under the RLA, the rights of returning strikers are a well-recognized topic of bargaining and, historically, such rights have been protected by means of back-to-work agreements.[7]

For whatever reasons, IFFA and TWA were not able to reach a back-to-work agreement that covered the rights of the returning strikers in the instant case. Now, by means of this litigation, IFFA is attempting to achieve the very protections it did not obtain in bargaining. However, the absence of an agreement does *not* indicate a failure of the collective bargaining process necessitating judicial intervention. It may simply indicate that one or both parties have been inflexible in their

[7] AIRCON records indicate that since deregulation there have been nineteen strikes in the industry and fifteen have ended with back-to-work agreements. *See, e.g., Air Line Pilots v. United Air Lines*, 802 F.2d at 894 (7th Cir. 1986); *Fechtelkotter v. Air Line Pilots*, 693 F.2d 899, 900 (9th Cir. 1982); *Machinists v. Alaska Airlines*, 639 F. Supp. 100, 101 (W.D. Wash. 1987); *Machinists v. Alaska Airlines*, 124 L.R.R.M. (BNA) 2458, 2459 (W.D. Wash. 1986); *Teamsters v. Pan American World Airways*, 607 F. Supp. at 610; *Texas Int'l Airlines v. AFA*, 498 F. Supp. 437, 441 (S.D. Tex. 1980), *aff'd* 667 F.2d 1169 (5th Cir. 1982). *See infra* note 9.

bargaining demands. But the Court should not encourage the parties to litigate for the purposes of obtaining negotiation leverage. As the Court noted in *Burlington Northern*:

> An injunction does not settle a dispute—it simply disables one of the parties. Moreover, . . . the availability of such self-help measures . . . may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle . . . .

107 S. Ct. at 1854.[8]

Viewed in this context, the language and legislative history of the Railway Labor Act become even more compelling. Congress drafted two limited provisions, Sections 2 Third and 2 Fourth, to protect employee rights in the organizing context. For the post-certification period, Congress established a delicately balanced set of dispute resolution mechanisms. The disputes that underlie this litigation have been statutorily committed by Congress to the RLA bargaining processes and have historically been resolved in that manner. The federal courts are not authorized by the statute to impose a contract on the parties in the form of a back-to-work mandate.

[8] In another case between the parties, subsequently decided, *IFFA v. Trans World Airlines*, 682 F. Supp. 1003 (W.D. Mo. 1988) (WESTLAW), the court rejected an IFFA claim that TWA had violated Section 2 First through its bargaining approach. In reaching its conclusion, the court noted:

> IFFA had caused many millions of dollars of damage to TWA, and had vigorously 'roasted' the new ownership. It is not a function of the court to insist that an employer cheerfully accept strike losses or show generosity in victory. A lawsuit should protect a party from the proven results of illegal conduct but does not serve as a safety net insuring against all forms of grievous injury.

WESTLAW slip op. at 59.

IV. The Eighth Circuit's Decision On Cross-Overs Is Harmful To Labor-Management Relations In The Airline Industry

When analyzed from a practical perspective of labor-management relations in the airline industry, the Eighth Circuit's decision is indefensible because of the pernicious effects that it will have on carriers and employees. Even more significant, the ruling below will interject the federal courts into airline collective bargaining in a manner that will have a serious destablizing effect.

In the extraordinarily competitive, post-deregulation airline industry, an air carrier confronted with a work stoppage of any duration has a strong impetus to attempt to operate. In the current environment, market share lost during a strike may never be regained or may only be regained at a great cost to future profitability.[9]

The Eighth Circuit's decision will seriously undermine a carrier's efforts to avoid these dire economic consequences by substantially handicapping its ability to

[9] During the past decade, labor relations in the airline industry have undergone a fundamental transformation. As a result of the Airline Deregulation Act of 1978, 49 U.S.C. § 1301 *et seq.*, unprecedented competitive pressures have disrupted labor market stability and heightened the confrontational dimension of collective bargaining. Virtually every major air carrier has experienced some form of labor strife and the federal courts have been challenged with the unprecedented task of applying the Railway Labor Act to this volatile environment. *See supra* note 7. In the 1980's alone the industry has suffered several important strikes: in 1980-81 Continental was struck by the Union of Flight Attendants and Pacific Southwest Airlines was struck by the Southwest Flight Crew Association; in 1982 Northwest was struck by the International Association of Machinists; in 1983 Continental was struck by the Machinists; in 1985 United Air Lines was struck by the Air Line Pilots, Alaska Airlines was struck by the Machinists, and Pan American was struck by the Transport Workers Union; in 1986 Trans World Airlines was struck by the Independent Federation of Flight Attendants.

maintain any semblance of normal operations during a strike. After all, few junior employees will accept the psychological and even physical risks of crossing a picket line when they know that, after the strike, they will almost certainly be displaced by senior returning strikers. Without some critical mass of experienced employees who are willing to cross picket lines and work during a strike, the chances of a carrier successfully operating during a strike are greatly reduced, particularly if the striking union represents more highly skilled employees for whom there is limited availability of permanent replacements (*e.g.*, pilots or mechanics). Moreover, once unions realize that carriers will be unable to operate, an important deterrent to strikes will be lost.

The Eighth Circuit's decision also penalizes junior employees unfairly. Consider, for example, the plight of a junior employee in a strike during which the carrier attempts to continue operations. Once the carrier starts to hire permanent replacements, the Eighth Circuit's decision will make the junior employee's options very unappealing: (1) the employee can remain on strike, have his or her position filled by a permanent replacement and, at the conclusion of the strike, he or she can wait (possibly years) for a vacancy to occur; or (2) the employee can cross-over but, if the Eighth Circuit is correct, the low seniority employee will be replaced by a more senior, returning striker at the conclusion of the strike. This result is unfair to the junior employee because, even if he or she works during the strike, he or she cannot achieve as secure a status as a new-hire, permanent replacement. *See Belknap v. Hale*, 463 U.S. 491 (1983). Thus, rather than protecting a junior employee's freedom to engage in or to refrain from striking, the Eighth Circuit effectively mandates that a junior employee join the strike as his or her best hope for securing a position. Alternatively, the decision of the Eighth Circuit encourages a junior employee to pursue the

dubious course of resigning and seeking re-employment (without seniority) as a permanent replacement.

Finally, the Eighth Circuit's decision will have a destabilizing effect on labor relations by making it more difficult to negotiate back-to-work agreements. Historically, such agreements have been used in the airline industry to resolve voluntarily not only issues related to the rights of strikers vis-a-vis replacements and cross-overs, but also questions related to discipline for strike-related misconduct, pension and health and welfare contributions for the period of the strike, settlement of other related litigation and the order of recall in connection with the resumption of normal operations. *See supra* note 7. By interpreting the RLA in an interventionist manner, the Eighth Circuit has virtually assured that these useful agreements will become less common. When negotiating back-to-work agreements, carriers will undoubtedly seek some protection for employees who crossed over during the strike. Unions, however, will find it politically difficult to concede on this point because such a concession would necessarily involve a waiver of the "statutory rights" created by the Eighth Circuit. Thus, the Eighth Circuit's prohibition on retaining cross-overs will, paradoxically, make the resolution of strikes more difficult.

Indeed, this once again raises the central flaw of the Eighth Circuit's decision: without a statutory basis, the federal courts are being interjected into what has heretofore been committed to collective bargaining. The entire history of labor legislation in this country and particularly the Railway Labor Act, however, has been based upon the premise that issues between labor and management are better resolved through private negotiation than through legislative or judicial intervention. The decision of the Eighth Circuit should be reversed as an important reaffirmation that this policy is still predominant.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* The Airline Industrial Relations Conference urges that the Court reverse the decision below.

Respectfully submitted,

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